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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1459

ERNEST FEELINGS,

Petitioner,

v.

EUGENE LEFEVRE, *Superintendent,*
Clinton Correctional Facility, New York,

Respondent.

REPLY BRIEF FOR PETITIONER

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This reply brief is submitted on behalf of petitioner for the purpose of addressing only one important point which has been misstated by respondent in its brief in opposition ("Res. Br.").

Respondent contends that petitioner "seeks to throw open for review the *facts* surrounding his confession" (Res. Br. at 4, emphasis in original).

This is not accurate. What petitioner seeks is review of the District Court's failure to have considered the full factual record at all. Petitioner is seeking to have all the relevant facts *opened for the first time* in a Federal forum.

Petitioner's point is thus a threshhold one: that the District Court in conducting its habeas review did not have all the facts before it, for the reason that it conducted its review of the state court judgment of conviction only on

petitioner's trial record and not on that of his co-defendants as well.

Petitioner also contends that this would have made a difference, and that if the District Court had had both records before it, it would have reached a different conclusion than it did (a) about whether the state court record was sufficient to have permitted the exclusion of independent testimony in the habeas proceeding except on the limited issue of petitioner's psychiatric state and (b) whether "the fact-finding procedure employed by the state court" gave petitioner "a full and fair hearing" on the issue of voluntariness itself. *Townsend* v. *Sain*, 372 U.S. 293, 313 (1963).

But regardless of whether a review of both records would or would not have made a difference, petitioner contends that at least he was entitled to have the District Court review both of them, not just one of them, in assessing the facts.

ARGUMENT

Point I

The Record of the Trial of Petitioner's Co-Defendants is Properly a Part of the Record in Habeas Review and Should Have Been Considered by the District Court Below

Without citing authority, respondent asserts (Res. Br. at 4, n.*) that "[p]etitioner's habeas corpus application . . . must be limited to a review of the record made by petitioner at his hearings and trial."

This is not so. Where related state court proceedings contain probative evidence on a petitioner's habeas claim, the record of such proceedings should be considered by the Federal court as part of its independent review. *Dale* v. *Williams*, 327 F.Supp. 381 (E.D.Pa. 1971), *rev'd on other grounds*, 459 F.2d 763 (3rd Cir. 1972).

There a writ of habeas corpus was sought on the grounds that the petitioner's conviction had been improperly obtained on the perjured testimony of a co-defendant who had turned state's witness. Substantiation of the alleged perjury was claimed to be contained in the record of the co-defendant at the hearing on the latter's guilty plea. District Judge Weiner, in ruling on the habeas petition, properly looked to both the state court record of the petitioner and the separate record of the co-defendant. 327 F.Supp. at 382. Only by so doing was he able to reach the conclusion that the "State court record is adequate for a determination of the merits of the [petitioner's] contention and no evidentiary hearing is required." *Ibid.*

Similar consideration of a co-defendant's record was relied upon in *United States ex rel. Darrah* v. *Brierley*, 415 F.2d 9 (3rd Cir. 1969), where the court upheld the denial of an independent hearing on a habeas petition because the petitioner had "testified for the state in the trial of a co-defendant wherein he admitted his implication" in the crimes with which he was charged. 415 F.2d at 12 (emphasis omitted).*

Here petitioner was accorded neither such a review of his co-defendants' record, as was done in *Dale*, nor was he given an evidentiary hearing on the full facts of waiver. While the District Court states that a "full hearing" was held on this issue (13a), the transcript in the District Court shows that the evidence adduced was testimony on petitioner's mental competence. Except for petitioner's statements of inability to recollect most of the events surrounding his arrest, there was no evidence as to all the other elements which this Court has recently reaffirmed should be considered to support a finding of voluntary, knowing and intelli-

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* Indeed, the completeness of the state court record is essential if a habeas petitioner is to be provided with "the equivalent of a full and fair evidentiary hearing." *Reeves* v. *Henderson*, 380 F.Supp. 661, 662 (W.D.La. 1974). *Accord, Griswold* v. *Eyman*, 452 F.2d 923, 924-25 (9th Cir. 1971); *Allison* v. *Holman*, 326 F.2d 294, 296-97 (5th Cir. 1963), *cert. denied*, 376 U.S. 957 (1964).

gent waiver. *North Carolina* v. *Butler*, ____ U.S. ____, 47 U.S.L.W. 4454 (1979). Despite its length, the opinion of the District Court below contains virtually no discussion of any facts established at that hearing. Its conclusion (13a-14a) is entirely summary on the quesiton of waiver.*

Point II

The Facts As Shown in the Full State Court Record Are Inconsistent With the Voluntary, Knowing and Intelligent Waiver of Petitioner's Rights

If the full record is considered, as it should have been below, it becomes clear that the District Court would have had a *different* set of facts before it than it thought it had.

Because the District Court had only petitioner's 1972 record, and the testimony on petitioner's mental competence, it had the clear impression that petitioner's identity was never in doubt by the police on the day of his arrest. There was nothing in the 1972 record to contradict or cast doubt on the prosecution's testimony that the confidential tip which led to petitioner's arrest had disclosed petitioner's link to the crime, and that the police were not only aware of this link but made their awareness known to petitioner at the time he was in custody (1972 R85-92, 213-14**). Respondent stresses that a confession by petitioner in such circumstances was only "logical" (Res. Br. at 15).

The District Court appears to have been persuaded by the same logic. The 1969 record, however, adds critical

* The District Court merely states that, "In addition to the records of proceedings in the state [sic], the court heard Dr. Raymond Chaitin, a psychiatrist, the petitioner and the petitioner's brothers. The court credits the testimony of the psychiatrist and finds that [waiver has] been established beyond a reasonable doubt" (14a). Dr. Chaitin was the state's psychiatric expert at petitioner's 1972 trial (Main Brief at 14). Only one brother of the petitioner testified, and solely on the issue of his impressions of petitioner's mental stability.

** References to the record are as in petitioner's Main Brief.

details which are wholly absent from both the 1972 record and from the District Court hearing and which undermine the "logic" of petitioner's "voluntary" waiver.

The 1969 record indicates that the police did not know petitioner's identity when they arrested him and that they found him with Brigham by chance (1969 R85, 91, 312-13). If the 1969 record is accurate, petitioner was thus arrested without a warrant (1969 R754) and without probable cause as to him.*

Similarly the 1969 record does not support the idea that petitioner "logically" volunteered a confession because he realized, without police interrogation, that he had been crossed. Petitioner's Main Brief (at 14-16) has set forth the contrasting testimony of the police in 1969 and 1972 about how petitioner's "verbatim" statement was obtained. The 1969 record also shows that as of the time of petitioner's arrest, the police believed they were dealing with a crime committed by at most five persons, of whom they had positive leads for only four (Brigham, John Wilson and the two Fillyaws). However, the 1969 record, to the extent it reveals anything, suggests that the fifth individual was not petitioner but another suspect, Herman McNeil (1969 R1295, 1304).**

* The police had a justification for keeping petitioner in custody because of the drugs found in the Greene Avenue apartment (1969 R12-13b). The presence and use of drugs by both petitioner and Brigham that day would also have given petitioner ample motive to try to escape from the apartment and to be generally apprehensive of police custody and interrogation, whether he had been a suspect in the Leonard Electrical Company robbery or not.

** The 1969 record shows that Morse Fillyaw had told George Wilson, the original informer as to his cousins, about the crime on December 3, 1967, but he would not tell Wilson who had done the shooting (1969 R1315). Wilson had told the police the next day about the likely involvement of John Wilson, Morse Fillyaw and Herman Fillyaw, and he also mentioned "Randy" and "MN" to them (1969 R1295, 1304). The police later traced "Randy" to being Willie Brigham through their interview with Johnnie Mae Zimmerman on December 8 (1969 R296). But the fifth suspect, "MN" remained unknown, although the initials square with the name McNeil. From

In short, petitioner was being held by the police on essentially an everything-to-win, nothing-to-lose basis. When petitioner was then identified by two of the four individuals who witnessed the line-ups, the police may well have believed they had found their fifth suspect. Hence the motivation to obtain a confession from petitioner whether or not he was an innocent or even a framed victim of Brigham's arrest.

The foregoing facts, and those described at greater length in petitioner's Main Brief, turn the largely untroubled 1972 record which the District Court reviewed into a record which, at the least, calls for further scrutiny by the District Court.

It is a record which, in material respects, closely resembles the factual situation in *United States* v. *Middleton*, 344 F.2d 78 (2nd Cir. 1965). There, although the case involved Rule 5(a) of the Federal Criminal Rules, the use of a suspect's confession at trial was reversed when the delay in arraignment, nowithstanding *Miranda*-type warnings, had been occasioned for the "single objective—to obtain a flat admission from the [suspect's] lips" that he had committed the crime for which he had been arrested. 344 F.2d at 82.

Nor was the use of the line-ups in this case dissimilar, given the circumstances of petitioner's arrest, from the use of the lie detector test in *Mallory* v. *United States*, 354 U.S.

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the 1969 record, the police did not know of the involvement of any sixth person until the confessions were taken.

McNeil, while indicted in 1968 with petitioner and the other four, remained a fugitive until after petitioner's trial in 1972. He was subsequently arrested, tried and found guilty. No transcript of his trial has been located despite inquiries by the undersigned to his attorney, the Kings County court reporters and the trial judge. There is no record of any appeal by McNeil of his conviction. The absence of any record of the testimony at McNeil's trial is all the more reason that the review accorded petitioner below was inadequate (*see* Point I).

449, 450-451, 455 (1957). And here it is questionable, from the 1969 record at any rate, whether the police had probable cause to arrest petitioner in the first place for the crime for which he was booked the following morning, after his alleged confession.

Respondent challenges that the record in this case rises to the level of a challenge to New York's two-step arrest procedures, at least as applied to petitioner. Those procedures, however, constituted essentially the license for the police to ignore the need to arraign petitioner promptly on any charge, even that of possession of the drugs found in the Greene Avenue apartment. Had a formal arrest of petitioner been made, even if after the line-ups, some meaningful safeguards might have been interposed to protect against the possibility that petitioner was arrested by mistake and convicted *over four years later*, principally on the basis of a confession which may well not have been voluntary.

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Respectfully submitted,

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